(22)

No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE CENTER FOR NATIONAL SECURITY STUDIES AND THE CONSTITUTION PROJECT SUPPORTING PETITIONER ON THE EFFECT OF THE DETAINEE TREATMENT ACT OF 2005

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QUESTIONS PRESENTED

Amici will address the following questions:

Whether Section 1005 of the Detainee Treatment Act of 2005 divests this Court of jurisdiction over this case, and if so, whether that provision is constitutional.

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INTEREST OF AMICI CURIAE[1]

Amici respectfully submit this brief to the Court on the effect of the Detainee Treatment Act of 2005, which was enacted after this Court granted certiorari in this case. *Amici* submit that the Act does not divest this Court of jurisdiction over this case, and that the Court should proceed to a determination on the merits.

Amicus Center for National Security Studies is a nonprofit, nongovernmental civil liberties organization in Washington, D.C., that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center has worked for more than 25 years to find solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government.

Amicus the Constitution Project is a nonprofit organization that seeks to build consensus on and develop solutions to contemporary legal and constitutional issues through a combination of scholarship and public education. After September 11, 2001, the Project created its Liberty and Security Initiative, a bipartisan, blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties even as we work to enhance our Nation's security. The Initiative develops recommendations on such issues as the use of military commissions and the detention of suspected terrorists. In addition, the Project's Courts Initiative conducts public education on the importance of an independent judiciary and cautions against legislation by Congress and state legislatures that would limit the substantive jurisdiction of courts.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this brief have been submitted to the Clerk.

SUMMARY OF ARGUMENT

I. The recently-enacted Detainee Treatment Act of 2005 (Act), which purports to replace habeas corpus review for detainees at Guantanamo Bay with judicial review after the final decisions of military tribunals and commissions, does not divest this Court of jurisdiction over this case. The text, structure, and legislative history of the Act make clear that it does not apply to habeas cases, such as this, already pending in the federal courts on the date of enactment. Nor does the Act apply to this case on the reasoning that it is jurisdictional. Further, applying the Act to pending cases would raise serious constitutional questions as to whether Congress had acted in violation of the Suspension Clause of the Constitution, art. I, § 9, cl. 2. Finally, even if the Act did withdraw habeas jurisdiction over this case under 28 U.S.C. § 2241, this Court would retain jurisdiction over this case and authority to issue the writ under the All Writs Act and the Constitution itself.

II. If the Act does divest this Court of jurisdiction over this case, then it is unconstitutional. The Suspension Clause guarantees that, unless Congress specifically acts to suspend the writ, the core of the Great Writ at common law, which would issue to test the legality of Executive detention, must remain available. Contrary to longstanding habeas practice, under which a habeas petitioner could challenge the authority of the Executive to detain him and the military to try him even before any proceedings were completed on the ground that he had a right not to be so tried, the Act would deprive petitioner of that opportunity. Moreover, it is far from clear that the Act would otherwise allow petitioner to raise many of his core constitutional and legal challenges after any final ruling by a military commission. The Act cannot be defended as a valid suspension of habeas corpus by Congress because Congress has given no indication that it has taken the grave step of invoking its Suspension Clause powers and because the constitutional prerequisites for a suspension—an "Invasion" or a "Rebellion"—are not present, as they have been on the rare occasions when Congress has suspended habeas corpus.

ARGUMENT

I. THE DETAINEE TREATMENT ACT DOES NOT DEPRIVE THIS COURT OF JURISDICTION TO CONSIDER PETITIONER'S CHALLENGES TO THE MILITARY COMMISSION'S JURISDICTION TO TRY HIM

The recently-passed Detainee Treatment Act of 2005 (Act) does not disturb this Court's jurisdiction to entertain petitioner's legal challenge to the authority of the military commission that has been convened to try him.[2] The provisions of the Act limiting the jurisdiction of federal courts to hear Guantanamo detainees' claims apply only *prospectively* to applications for writs of habeas corpus filed on or after the effective date of the Act. Thus, the Act does not affect the pending proceedings on petitioner's application for a writ of habeas corpus, which he filed on April 6, 2004 (*see* Pet. App. 21a). This conclusion is supported by the text and structure of the Act, its legislative history, and the well-established canon that courts should avoid construing a statute in a manner that raises "serious constitutional problems" where "an alternative interpretation is 'fairly possible.'" *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001). In addition, even if the Act did preclude this Court from entertaining petitioner's challenge under 28 U.S.C. § 2241, this Court would still have authority to entertain petitioner's challenge under the Constitution itself and under the All Writs Act, 28 U.S.C. § 1651.

A. The Text And Structure Of The Act Show That It Does Not Disturb This Court's Jurisdiction Over This Case

1. Section 1005(e) of the Act, entitled "Judicial Review of Detention of Enemy Combatants," is composed of three principal subsections. Section 1005(e)(1) provides:

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[2] The Detainee Treatment Act of 2005 was enacted as Title X of Division A of Public Law No. 109-148, which was signed into law by the President on December 30, 2005. An identical version of the Detainee Treatment Act appears at Title XIV of the National Defense Authorization Act, H.R. 1815, 109th Cong., 1st Sess., which has passed both Houses of Congress but has not yet been signed by the President.

IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant."

Subsections (2) and (3) set forth procedures for the review of final decisions of, respectively, the Combatant Status Review Tribunals (CSRTs) and military commissions, including in both instances limited review by the United States Court of Appeals for the District of Columbia Circuit.[3]

Section 1005(h) provides:

EFFECTIVE DATE—

(1) IN GENERAL—This section shall take effect on the date of the enactment of this Act.

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[3] Section 1005(e)(4) provides that the Secretary of Defense shall be named the respondent in any appeal to the United States Court of Appeals for the District of Columbia from a decision of the CSRT or military commission.

> (2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

2. The foregoing provisions make clear that Congress did not intend Section 1005(e)(1) to apply to pending habeas cases challenging the authority of a military commission to try an individual, including this case. This conclusion follows as a straightforward matter from applying standard principles of statutory construction to the text of Section 1005.

Section 1005(h)(1), standing on its own, is silent as to whether Section 1005(e)(1) should apply to pending cases, stating only that the section "shall take effect on the date of the enactment of this Act." That effective-date provision does not resolve whether Section 1005(e)(1) applies to pending cases; as this Court has stated several times, "a 'statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.'" *St. Cyr*, 533 U.S. at 317 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 257 (1994)).

When Section 1005(h)(1) is viewed in combination with Section 1005(h)(2), however, it becomes clear that Congress affirmatively decided *not* to oust the courts' jurisdiction over cases such as this one. In contrast to Section 1005(h)(1), Section 1005(h)(2) states that Sections 1005(e)(2) and (3) "shall apply" to certain cases pending as of enactment. Because Section 1005(h)(2) singles out only Sections 1005(e)(2) and (3) for application to pending cases, and excludes Section 1005(e)(1) from that rule, it strongly indicates, by negative implication, that Section 1005(e)(1) will apply only to habeas actions initiated after enactment of the Act, and not to habeas cases pending on the date of enactment.

This Court encountered an analogous statutory scheme in *Lindh* v. *Murphy*, 521 U.S. 320 (1997). In that case, the

Court considered whether amendments to chapter 153 of Title 28 imposing new limitations on the availability of federal habeas corpus in non-capital cases, which were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), should apply to cases pending on the date of AEDPA's enactment. Although the pertinent provisions of AEDPA did not expressly address the temporal applicability of the amendments to chapter 153, the Court stressed that AEDPA had also amended chapter 154 of Title 28 by imposing limitations on habeas corpus in capital cases and had expressly provided that those amendments *would* apply to pending cases. *Lindh*, 521 U.S. at 327. The Court concluded that AEDPA's express application of chapter 154 "to all cases pending at enactment . . . indicat[ed] implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases *only when those cases had been filed after the date of the Act.*" *Id.* (emphasis added).

Lindh's reasoning is directly on point. "If Congress was reasonably concerned to ensure that [Section 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [Section 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." 521 U.S. at 329. This conclusion that Congress intended Section 1005(e)(1) not to apply to pending habeas actions is buttressed by the "the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* at 330. Sections 1005(h)(1) and (2) appear together in the same section of the statute, and (as discussed below) Congress considered them together when drafting the statute. Thus, Section 1005(h)'s express and carefully considered application of the new provisions for review in Sections 1005(e)(2) and (3), and only those Sections, to pending cases strongly indicates that Section 1005(e)(1) does not bar habeas petitions pending on the date of the Act's enactment.

B. The Legislative History Of The Act Confirms That Section 1005(e)(1) Does Not Apply To Pending Cases

The text and structure of Section 1005 are sufficiently clear about the temporal applicability of Section 1005(e)(1) that no resort to legislative history is necessary. The legislative history on that question, however, confirms that Congress did not intend the Act to divest this Court or any other federal court of jurisdiction to consider habeas applications pending on the date of the statute's enactment. In particular, the language of Section 1005(h) that Congress enacted stands in sharp contrast to earlier versions of that provision, which would have applied new restrictions on habeas corpus applications by Guantanamo Bay detainees to all pending cases.

As Senator Levin, one of the Act's chief sponsors, explained on the floor, Congress' decision not to apply Section 1005(e)(1) to pending cases is demonstrated by the fact that it adopted the final language of Section 1005(h) in lieu of at least three other proposed versions, each of which would have sought to divest this Court of jurisdiction over this case. *See* 151 Cong. Rec. S14,257-S14,258 (daily ed. Dec. 21, 2005). An earlier version (the Graham-Kyl-Chambliss Amendment), which passed the Senate on November 10, 2005, contained language to the effect that the preclusion of jurisdiction over habeas corpus petitions filed by detainees at Guantanamo Bay "shall apply to any application or other action that is pending on or after the date of enactment of this Act." *See id.* at S12,667 (daily ed. Nov. 10, 2005) (Amendment 2516, § (d)(3)); *see also id.* at S12,655 (virtually identical language in proposed Amendment 2515). On the floor, Senator Levin expressed his opposition to the Graham-Kyl-Chambliss Amendment on the ground (among others) that it would terminate this Court's jurisdiction over this case. *See id.* at S12,664.

Just a few days later, the Senate replaced the Graham-Kyl-Chambliss Amendment with the Graham-Levin-Kyl Amendment, the direct predecessor of Section 1005. *See* 151 Cong. Rec. S12,803 (daily ed. Nov. 15, 2005) (vote on

Amendment 2524).[4] Senator Levin stated on the floor during the debate on the Graham-Levin-Kyl Amendment that the Amendment was preferable to the earlier Amendment because, among other things, its new limits on habeas corpus petitions by Guantanamo detainees "would apply only to new habeas cases filed after the date of enactment." *Id.* at S12,802. No Senator rebutted that statement by Senator Levin during the debate.[5]

When the Senate eventually voted on the final version of the National Defense Authorization Act, which contained the language at issue in this case (drawn directly from the Graham-Levin-Kyl Amendment approved by the Senate on November 15), Senator Levin again stated his understanding that the Amendment does not divest this Court of jurisdiction of this case and expressed his support of that decision: "By taking this position, we preserve comity between the judicial and legislative branches." *See* 151 Cong. Rec. S14,257 (daily ed. Dec. 21, 2005). In other words, Congress desired to "avoid repeating the unfortunate precedent in *Ex parte McCardle*, [74 U.S. (7 Wall.) 506 (1868),] in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before the Court." 151 Cong. Rec. S14,257-S14,258 (daily ed. Dec. 21, 2005).

Congress therefore showed due respect for this Court's adjudicative processes. At a minimum, a far more clear basis in text and legislative history would be required to reach the conclusion that Congress deliberately decided to intervene in a case already pending before this Court and nullify

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[4] The text of Amendment 2524 appears at 151 Cong. Rec. S12,752-S12,773 (daily ed. Nov. 14, 2005).

[5] In addition, another early draft amendment contained language stating that the new limits on habeas jurisdiction "shall apply to any application or other action that is pending on or after the date of enactment of this Act," but that version never became law. *See* 151 Cong. Rec. S14,257-S14,258 (daily ed. Dec. 21, 2005) (statement of Sen. Levin). Finally, a House proposal at the Conference Committee would have provided that the limits "shall apply to any application or action that is pending on or after the date of enactment of this Act." *Id.* That proposal was not enacted.

this Court's authority to decide that case. *Cf. Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 106 (1868) (declining to conclude that Court's jurisdiction had been repealed "without the expression of such intent, and by mere implication").

There were, to be sure, statements made in the Senate—*after* the definitive November 15 Senate vote on the Graham-Levin-Kyl Amendment, which became Section 1005—that suggest that some Senators expected Section 1005(e)(1) to apply to pending cases, including this case.[6] Other Senators stated precisely the opposite conclusion.[7] But even if the expressed remarks by Senators do not resolve the question, the Senate's *actions* do. The Senate *replaced* a version of the amendment that would have expressly applied the new limits on habeas corpus to pending cases with one that did not. This deliberate action by the Senate is powerful evidence that Section 1005(e)(1) does not apply to pending cases. *Cf. Doe* v. *Chao*, 540 U.S. 614, 621-623 (2004) (declining to adopt reading of statute that would have replicated language that Congress removed from the bill during drafting process).

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[6] *See* 151 Cong. Rec. S14,263-S14,268 (daily ed. Dec. 21, 2005) (statements of Sen. Kyl and Sen. Graham). These statements by Senators Graham and Kyl were made well *after* the definitive vote in the Senate on November 15, 2005, to adopt the Graham-Levin-Kyl Amendment. *See* pp. 7-8, *supra*. Senator Levin's floor statement explaining that the restrictions on habeas in the Amendment would not apply to pending cases was made during debate on that specific Amendment and just before that definitive vote. *See* pp. 7-8, *supra*. Senator Levin's statement is therefore far more probative of the meaning of that Amendment. *Cf. Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982) (declining to accord weight to "post hoc" congressional statements).

[7] *See* 151 Cong. Rec. S14,170 (daily ed. Dec. 20, 2005) (statement of Sen. Kennedy); *id.* at S14,245 (daily ed. Dec. 21, 2005) (statement of Sen. Leahy); *id.* at S14,252, S14,274 (statement of Sen. Durbin); *id.* at S14,253, S14,272 (statement of Sen. Feingold); *id.* at S14,275 (statement of Sen. Reid).

C. Section 1005 Is Not Presumed To Apply To Pending Cases On The Ground That It Is A "Jurisdictional" Statute

Any suggestion that Section 1005(e) should be presumed to apply to pending cases simply because it is *jurisdictional* in nature should be rejected. In *Landgraf*, this Court did state, in explaining the contours of the "presumption against statutory retroactivity," that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *See* 511 U.S. at 273-274. But that statement does not control this case because, as this Court further explained in *Landgraf*, "[a]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Id.* (quoting *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916)). As the Court has explained, "[s]tatutes merely addressing which court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only where a suit may be brought, not whether it may be brought at all." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (internal citation omitted).[8]

Here, the effect of the application of Section 1005(e) would not be merely procedural, for it would leave petitioner without any judicial forum whatsoever to hear his current challenge to the military commission's authority to try him. Section 1005(e) affects whether such a challenge "may be brought at all." In that respect, this case is, again, similar to *Lindh*, where the Court, in holding that AEDPA's amendments to Title 153 did not apply to pending habeas cases,

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[8] This Court also cast doubt on the proposition that there is any "presumption" that jurisdictional statutes apply to pending cases. *See Hughes Aircraft*, 520 U.S. at 950 ("The Ninth Circuit simply misread our decision in *Landgraf*, for the only 'presumption' mentioned in that opinion is a general presumption *against* retroactivity.").

noted that the new restrictions on habeas imposed by AEDPA went "beyond 'mere' procedure to affect substantive entitlement to relief." 521 U.S. at 327. Here, a reading of Section 1005 that would deprive all federal courts (including this Court) of jurisdiction over this case *ipso facto* would render the statute determinative of petitioner's claimed *substantive* rights. As such, Section 1005(e)(1) should be subject to the Court's regular presumption against retroactivity and not made applicable to already-pending cases.[9]

In any event, whether or not Section 1005(e)'s provisions are fairly characterized as "substantive" or "procedural," the Court in *Lindh* made clear that, "in determining a statute's temporal reach generally, our normal rules of construction apply." 521 U.S. at 326. In other words, "[a]lthough *Landgraf*'s default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case)." *Id.* Here, as discussed above, Section 1005(h)(2)'s express application of the statute's provisions for review of final CSRT and commission decisions to pending cases demonstrates by negative implication that Section 1005(e)(1) does not apply to pending habeas cases such as this one. Thus, under *Lindh*, normal

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[9] The fact that petitioner could attempt to present his jurisdictional challenge to the military commission itself does not render Section 1005(e)(1) "procedural" for purposes of retroactivity analysis. *See Hughes Aircraft*, 520 U.S. at 951. It is highly doubtful that a military commission convened pursuant to the President's Military Orders could declare itself unconstitutional. *Cf. Mathews* v. *Diaz*, 426 U.S. 67, 76-77 (1976) (exhaustion is futile when administrative agency has no power to declare governing statute unconstitutional). Thus, this Court's decision in *Hallowell* v. *Commons*, 239 U.S. 506 (1916), upholding the dismissal of a suit for equitable title to a deceased Indian's estate on the ground that a new statute conferred all jurisdiction over such matters on the Secretary of Interior, is inapposite. *Hallowell* was not a habeas case involving an incarcerated individual, and arguably the new statute did not "alter[] the nature or validity of petitioner's rights or the Government's liability." *Bruner* v. *United States*, 343 U.S. 112, 116 (1952). Here, the new limits on habeas challenges in Section 1005(e)(1), if applied to petitioner's case, would significantly "alter[] the nature or validity" of his rights.

rules of statutory construction preclude application of Section 1005(e)(1) to this case.

D. Section 1005 Should Be Construed To Avoid The Serious Constitutional Issues That Would Be Raised By Ouster Of This Court's Jurisdiction

Well-established canons of statutory construction further support the conclusion that Section 1005(e) does not apply to this pending case.[10] A construction of a statute that raises serious constitutional questions is disfavored. *See NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979). If petitioner were deprived of a forum in which he could present his constitutional challenges to the legality of the government's treatment of him, then a serious constitutional question would be raised as to whether Congress has unconstitutionally suspended the writ of habeas corpus in excess of its authority under the Suspension Clause. *See* U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it.").[11]

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[10] In addition, from this Court's earliest days, it has construed any ambiguity in a statutory provision for the writ of habeas corpus in favor of the availability of the writ. As the Court remarked in *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 449 (1806): "There is some obscurity in the act of congress, and some doubts were entertained by the court as to the construction of the constitution. The court, however, in favour of liberty, was willing to grant the *habeas corpus*."

[11] Section 1005(e)(1) cannot be characterized as having preserved petitioner's right to seek habeas in the lower courts, but not in this Court. If Section 1005(e)(1) is deemed to apply to this case, then it will not be just *this* Court's jurisdiction over the case that is ousted; no federal court will have had jurisdiction to entertain petitioner's case. *See* § 1005(e)(1) ("*no court*, justice, or judge shall have jurisdiction to hear or consider . . . any application for a writ of habeas corpus filed by or on behalf of an alien detained by the Defense Department at Guantanamo Bay, Cuba") (emphasis added). If the federal courts' subject-matter jurisdiction over a case is ousted while the case is pending at any level of the judiciary, including in this Court, then all federal courts have lost jurisdiction over the case *ab initio*. Thus, the D.C. Circuit's decision entertaining, but rejecting, petitioner's contentions could not remain standing; that decision would have to be vacated and the habeas petition dismissed for lack of jurisdiction. *Cf. United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

This Court should avoid a construction of Section 1005 that would raise such grave constitutional questions. In *St. Cyr*, this Court invoked this principle in concluding that various provisions of the AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) did not deprive federal courts of jurisdiction over an alien's challenge to the Attorney General's legal conclusion that the government lacked authority to grant them discretionary relief from deportation. The Court reasoned that "[a] construction of the [statutory provisions] at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions." 533 U.S. at 300.

So too here (and as discussed in greater detail below, pp. 18-30), a "substantial constitutional question" would be raised by a reading of Section 1005(e)(1) that would deprive the federal courts from entertaining petitioner's pre-trial challenge to the Commission's jurisdiction over him. "The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely." *St. Cyr*, 533 U.S. at 301 n.13. Moreover, "the absence of such a [judicial] forum, coupled with the lack of a clear, unambiguous statement of congressional intent to preclude judicial consideration on habeas of such an important question of law [regarding the commission's jurisdiction], strongly counsels against adopting a construction that would raise serious constitutional questions." *Id.* at 314; *see also Oestereich* v. *Selective Serv. Local Bd. No. 11*, 393 U.S. 233, 243 (1968) (Harlan, J., concurring) (construction of selective service statute precluding pre-induction review of petitioner's "substantial claim that he was ordered inducted pursuant to an unlawful procedure . . . would raise serious constitutional problems").[12]

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[12] By contrast, a conclusion that Section 1005(e) does not apply to pending cases will likely obviate most, if not all, of the serious constitutional questions that would be raised by Section 1005. Habeas actions

E. Even If This Court's Jurisdiction Under Section 2241 Has Been Repealed, The Court Retains Authority To Entertain A Habeas Corpus Petition Based On The Constitution Itself

Even were Section 1005(e)(1) to apply to this case, it would not thwart the authority of this Court to hear petitioner's claims. Although the statute, so applied, would deprive the Court of jurisdiction to consider an application for a writ of habeas corpus under Section 2241 of Title 28, the Court would retain authority to entertain a habeas corpus petition predicated on the Constitution itself. Unless Congress has validly suspended the writ of habeas corpus—and, as we explain below, it has not—the irreducible core of the Great Writ, to test the validity of executive detention, remains available to one who is held without valid authority.

This Court has recognized that habeas corpus is "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Rasul* v. *Bush*, 542 U.S. 466, 472 (2004) (internal quotations marks omitted; alterations in the original). "It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors . . . this great writ found prominent sanction in the Constitution." *Yerger*, 75 U.S. (8 Wall.) at 95-96. Thus, the negative phraseology of the Suspension Clause reflects the Framers' understanding that the privilege of the writ of habeas corpus is not something for Congress to *give*;

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challenging the validity of the military-commission system, as well as the government's extended and apparently indefinite detention at Guantanamo of persons that it has labeled "unlawful combatants," are already pending in the federal courts. *See Boumedienne* v. *Bush*, No. 05-5062 (D.C. Cir. argued Sept. 8, 2005); *Al Odah* v. *Bush*, No. 05-5064 (D.C. Cir. argued Sept. 8. 2005). It is likely that these cases will resolve most if not all of the systemic challenges that have been brought against the government's practices at Guantanamo. If the military-commission system, the CSRT system, and the government's authority to detain individuals indefinitely at Guantanamo are eventually upheld by the courts, then constitutional questions that might arise from *particular* cases could be entertained by the D.C. Circuit under Section 1005(e)(2) and (3). But, as discussed below, the D.C. Circuit might well not have authority under those provisions to entertain several important constitutional issues.

rather, that privilege preexists the Constitution, and may not be taken away unless the strict requirements of the Suspension Clause are met. *See St. Cyr*, 533 U.S. at 304 n.24 (noting that the Clause "was intended to preclude any possibility that the privilege itself would be lost by either the inaction or the action of Congress") (internal quotation marks omitted). The Constitution itself preserves the authority of the courts to issue the writ; as the Court stated in *Yerger*, "[t]he terms of [the Suspension Clause] imply judicial action." 75 U.S. (8 Wall.) at 95-96.

The fundamental proposition that there is a constitutional right to seek habeas corpus—even in the absence of an express statutory basis for a district court to exercise original jurisdiction over a petition for habeas corpus—found expression in *Eisentrager* v. *Forrestal*, 174 F.2d 961 (D.C. Cir. 1949). In that case, German nationals who were captured by the U.S. military in China after the surrender of Germany in World War II brought a habeas petition challenging their trial, conviction, and imprisonment by a military commission. The Court of Appeals, implicitly conceding that the District Court lacked jurisdiction under the habeas statute, found that the petitioners had a constitutional right to habeas corpus secured by the Suspension Clause.[13] This Court reversed the D.C. Circuit's decision and outlined six factors that were critical to its conclusion that the detainees did not have a constitutional right to seek habeas relief, including the fact that petitioner was an enemy alien and had been convicted by a military commission sitting outside the United States. *See Johnson* v. *Eisentrager*, 339 U.S. 763, 775 (1950).

This Court's recent decision in *Rasul*, which addressed the question whether Guantanamo Bay detainees have a right to seek habeas relief, casts considerable doubt on the

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[13] *See Eisentrager*, 174 F.2d at 963 ("Any person deprived of his liberty by an official of the United States Government in violation of constitutional prohibitions, has a substantive right to a writ of habeas corpus . . . he cannot be deprived of that privilege by an omission in a federal jurisdictional statute.").

applicability of *Eisentrager*'s holding to the Guantanamo Bay detainees. The Court in *Rasul* sharply distinguished *Eisentrager*, noting that the Guantanamo Bay detainees

> differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States, they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

542 U.S. at 475.

The implication of this Court's reasoning is that, unlike the German nationals in *Eisentrager*, the Guantanamo Bay detainees (including petitioner), who are held in executive detention, have a constitutional right to seek the writ of habeas corpus. Although this Court ultimately decided *Rasul* on statutory grounds in favor of the detainees, the Court's treatment of *Eisentrager* strongly supports the proposition that petitioner, who is held in executive detention, has a constitutional right to seek habeas relief.

To the extent statutory grounding is deemed necessary for the Court to grant a writ of habeas corpus outside Section 2241, such authority may be found in the All Writs Act. That Act authorizes this Court, and all courts of the United States, to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The Court traditionally has looked to the All Writs Act as an alternative source of statutory authority for the exercise of the "appellate Jurisdiction" accorded to the Court under Article III of the Constitution, where Congress has otherwise declined to clarify such authority for a particular case. *See Felker* v. *Turpin*, 518 U.S. 651, 666 (1996) (Stevens, J., concurring) (although AEDPA restricted the Court's appellate jurisdiction in a certain category of cases, the Act "does not purport

to limit . . . our jurisdiction under the All Writs Act"); *id.* at 667 (Souter, J., concurring) (noting the All Writs Act as an alternative source of statutory authority).[14]

Reliance on the All Writs Act to issue the writ of habeas corpus in this case would be both "in aid of" the federal courts' jurisdiction and "agreeable to the usages and principles of law." As discussed above, the Suspension Clause itself implies that courts have jurisdiction to issue the writ. And issuance of the writ of habeas corpus would be "agreeable" to a legal principle of great antiquity—that no one may be detained by the Executive contrary to law. *See Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 218-219 (1953) (Jackson, J., dissenting) ("Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint."). Accordingly, Section 1005 presents no obstacle to the Court's jurisdiction over this case.

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[14] The All Writs Act is derived from Section 14 of the Judiciary Act of 1789, which originally provided that the courts of the United States "shall have the power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principals and usages of the law." 1 Stat. 81. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), this Court concluded that the federal courts' power to issue the writ of habeas corpus under that section was not limited by that statute's restriction of writs to those "which may be necessary for the exercise of their respective jurisdictions." In other words, *Bollman* held that the availability of habeas corpus did not depend on the federal court having some other basis of jurisdiction over a case. Subsequently, Congress located the federal courts' power to issue the writ of habeas corpus, as construed by *Bollman*, in Section 2241. But when Congress did so, it also made clear that the federal courts independently have authority under the All Writs Act to issue "*all* writs" in aid of their jurisdiction, including the writ of habeas corpus—not "all *other* writs," as the Act of 1789 had provided.

II. If The Detainee Treatment Act Divests This Court Of Jurisdiction, Then It Is Unconstitutional

Article 1, § 9, cl. 2 of the Constitution (the "Suspension Clause") provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the public Safety may require it." The exercise of this authority to suspend the Great Writ—justly hailed as the "highest safeguard of liberty" (*Smith* v. *Bennett*, 365 U.S. 708, 712 (1961))—is a momentous step, and this Court has consistently expressed its hesitation to conclude that Congress has exercised its authority to suspend the Great Writ. *See St. Cyr*, 533 U.S. at 305 ("[A] serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise."); *Bollman*, 8 U.S. (4 Cranch) at 101 ("[u]ntil the legislative will [to suspend the writ] be expressed, this court can only see its duty" to issue the writ). Congress, too, has historically been extremely sparing in its exercise of the suspension power, acting to suspend the writ on only four occasions, when the country was facing actual or imminent hostilities on its territory. *See* pp. 26-30, *infra*.[15]

This jurisprudential and historical background provides three reasons to conclude that Section 1005, if it divests this Court of jurisdiction of this case, is unconstitutional. First, the Court has made clear that, at least absent a valid suspension of the Great Writ by Congress, the Constitution requires that a core of the writ must remain available, particularly where, as here, a challenge is made to the authority of the Executive to detain and try a prisoner. Section 1005 does not satisfy that requirement in this case.

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[15] Even the conspiracy of Aaron Burr was not deemed sufficient to warrant the suspension of the writ. *See* Morad Fakhimi, *Terrorism and Habeas Corpus: A Jurisdictional Escape*, 30 J. Sup. Ct. Hist. 226, 228, 238 n.23 (2005) (noting House's rejection of Senate's proposal to suspend the writ).

Furthermore, Section 1005 cannot be sustained as a legitimate suspension of the writ by Congress, for two independent reasons. Congress has not clearly expressed its "legislative will"[16] that the writ be suspended; at a minimum, a very clear statement by Congress should be required before this Court concludes that habeas corpus has been suspended. Moreover, even if Congress has purported to exercise its suspension power, the Framers placed limits on that authority; the Great Writ may not be suspended, as the Constitution makes clear, except in cases of rebellion or invasion and except where the public safety so requires. The common law background to the writ makes clear that it was to be available as long as civil institutions were functioning. Because this Nation's civil institutions, including the courts, are open and fully functioning, the current situation cannot justify suspension of the writ of habeas corpus.

A. The Act Would Not Leave In Place The Constitutionally Required Core of Habeas Corpus

1. This Court has never doubted that, absent a valid suspension of the writ by Congress, the Constitution itself requires that the writ be available in a constitutionally protected core of proceedings. *See Rasul*, 542 U.S. at 474; *St. Cyr*, 533 U.S. at 300. Although today the writ of habeas corpus is most frequently employed as a post-conviction collateral remedy for an unlawful criminal conviction, its " 'historical core' " served " 'as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.' " *Rasul*, 542 U.S. at 474 (quoting *St. Cyr*, 533 U.S. at 301); *Swain* v. *Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("The traditional Great Writ was largely a remedy against executive detention").

From its earliest habeas corpus cases, this Court has made clear that the writ should issue for the benefit of a petitioner who challenges the Executive's authority to *bring him to trial*, even before a final conviction is had at such a

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[16] *See Bollman*, 8 U.S. (4 Cranch) at 101.

trial.[17] Thus, in both *Bollman*, 8 U.S. (4 Cranch) 75, and *Burford*, 7 U.S. (3 Cranch) 448, the Court issued the writ for the benefit of a prisoner who contended that the government had an inadequate basis to detain him for criminal proceedings. *See also United States* v. *Hamilton*, 3 U.S. (3 Dall.) 17 (1795). Similarly, in *United States* v. *Villato*, 2 U.S. (2 Dall.) 370 (C.C.D. Pa. 1797) (No. 16,662), the defendant, committed by the district judge on a charge of high treason, persuaded the court that he had never been validly naturalized, and therefore could not be prosecuted for treason for acts committed abroad.[18]

These decisions were reaffirmed after the Civil War. In *Ex parte Yerger*, the Court held that it had jurisdiction to issue the writ to determine whether Yerger's *impending* trial by a military commission was lawful. *See Yerger*, 75 U.S. (8 Wall.) at 106; *see also id.* at 88 (statement of the case) (noting that Yerger was awaiting trial). The Court expressed no doubt that, if Yerger had (as he claimed) a right not to be tried by the military commission, he was entitled to release from the custody of the commission. The petitioner in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), was in the same position; he brought a pre-conviction habeas petition challenging the constitutionality of his military detention. Although the Court ultimately ruled in *McCardle* that it lacked jurisdiction over McCardle's appeal from the circuit court's decision to remand him to military custody, *see id.* at

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[17] Indeed, in our nation's early years, many habeas petitions involved commitment preceding conviction. *See* Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. Chi. L. Rev. 243, 258 (1965); *see also* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners*, 92 Mich. L. Rev. 862, 863-864 (1994) ("By 1789 and at common law, habeas was primarily used to challenge unauthorized pretrial detention.").

[18] *See also Hernandez* v. *Aury*, 12 F. Cas. 33 (D.S.C. 1818) (No. 6413) (releasing Commodore Aury from arrest on admiralty process because the United States would not adjudicate a prize dispute between foreign officers); *Thomas Sim's Case*, 61 Mass. 285, 309 (1851) (noting that issuance of habeas corpus is constantly done in cases of soldiers and sailors held by military and naval officers, under enlistments complained of as illegal and void).

515, it expressed no doubt that the circuit court could have issued a writ to prevent McCardle's trial by military commission, had McCardle established a right not to be so tried. *See Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 327 (1867) (stating that the questions of the circuit court's habeas corpus jurisdiction and the merits were essentially coextensive).

These decisions establish that, when a habeas petitioner challenges the authority or jurisdiction of the body that lays claim to try him—when the petitioner claims a right not to be tried by that entity—that petitioner is entitled to be heard on the merits of that challenge even before the trial is completed.[19] Here, petitioner is contending, in essence, that he has a right not to be tried by the military commission that the military authorities, acting under the direction of the President, have convened. If the writ were not available before the completion of the allegedly unlawful trial in such circumstances, the right not to be tried by an entity with no authority over the petitioner would be a nullity.

2. The government will likely argue that the Act is not an unconstitutional suspension of habeas corpus because the Act provides for review of final decisions of the military commission by the D.C. Circuit. This Court has made clear that, to avoid a violation of the Suspension Clause, a statutory substitute for the writ of habeas corpus must provide a fully adequate and effective means to test the legality of detention. *See Swain*, 430 U.S. at 378. In *Swain*, the Court concluded that a statutory provision for collateral review of convictions in the District of Columbia's Superior Court had not suspended the writ of habeas corpus because it was

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[19] In the Double Jeopardy context, where this Court has discussed a right not to be tried, *see Abney* v. *United States*, 431 U.S. 651, 661 (1977), lower courts have ruled that issuance of the writ of habeas corpus is appropriate before completion of an unlawful second trial in state court, notwithstanding the *Younger* abstention doctrine. *See Gilliam* v. *Foster*, 61 F.3d 1070, 1082 (4th Cir. 1995); *Mannes* v. *Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992); *Salter* v. *Leapley*, 977 F.2d 1259, 1261 (8th Cir. 1992); *Davis* v. *Herring*, 800 F.2d 513, 516 (5th Cir. 1986).

commensurate with habeas corpus in all material respects. *See id.* at 381-382.

Unlike the collateral remedy upheld in *Swain*, the Act's post-conviction review procedures do not adequately substitute for the writ of habeas corpus.

(a) Under the Act, a detainee's entitlement to judicial review of the legality of his detention is entirely predicated on the government's decision to institute proceedings against him, either in the form of a CSRT or a military commission. If the government simply does nothing, the detainee has no means of challenging the legality of his detention. Naturally, this provides an incentive for the government to delay, or not institute proceedings at all, which would effectively deprive detainees of any judicial forum.

Although the government has brought military commission proceedings against petitioner, he is not entitled under Section 1005(e)(3)(A) to judicial review until there has been a "final decision rendered pursuant to Military Commission Order No. 1." And under that Order, a commission finding only becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision.[20] Thus, petitioner, who has already been detained at Guantanamo Bay since 2002, may not obtain judicial review for an indefinite period of time after the military commission's finding. His fate, in that regard, is completely in the hands of the President, who is under no statutory compulsion to make a final decision within any specified time frame.

(b) Even when the government decides to bring charges and try a detainee before a military commission, the detainee does not have a right to obtain judicial review of his detention in non-capital cases in which the detainee was sentenced to a term of imprisonment of less than ten years. *See* Act § 1005(e)(3)(B). Instead, such review is at the discretion of the D.C. Circuit. *Id.* Thus, if a writ of habeas corpus cannot issue in this case, petitioner may find that he is convicted

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[20] *See* Department of Defense Military Commission Order No. 1 dated August 31, 2005.

but still have no opportunity to obtain judicial review of his conviction, including a judicial decision as to whether the military commission had authority to try him.

(c) Even if petitioner is ultimately *acquitted* by the military commission, he still may not have any remedy under the Act. While Section 1005(e)(2) of the Act provides that the jurisdiction of the D.C. Circuit shall cease upon the release of the alien determined to be a non-enemy combatant by the CSRT, there is no provision affording any remedy to a detainee after an acquittal by the military commission. Thus, if petitioner is acquitted by the military commission but is ultimately not released by the government, he may find himself in perpetual legal limbo under the Act.[21]

(d) Finally, the Act significantly restricts the scope of legal challenges that petitioner may ultimately bring to any final decision of a military commission. Section 1005(e)(3)(D) of the Act provides that the D.C. Circuit's jurisdiction on postconviction review shall be limited to the consideration of "(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A) [Military Order No. 1]; and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States."

This language has not yet been construed by the D.C. Circuit, but at least two aspects of Section 1005(e)(3)(D) raise cause for concern that the limited review it authorizes after a final decision of a military commission will not provide an adequate substitute for habeas corpus. First, Section 1005(e)(3)(D) might be construed to prevent the D.C. Circuit from considering, even after trial, petitioner's argu-

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[21] *Cf. Qassim* v. *Bush*, No. 05-0497 (JR), 2005 U.S. Dist. LEXIS 34618 (D.D.C. Dec. 22, 2005). In *Qassim*, the District Court held that it did not have the power to release Chinese nationals–despite a CSRT determination that they were not enemy combatants–because the government could not find another country to accept them and because releasing them into the United States raised national security and diplomatic issues.

ment that the President's use of military commissions violates separation of powers because Congress never authorized the commissions. The only constitutional and legal arguments that provision allows concern the constitutionality and legality of "*the use* of . . . standards and procedures" set forth in Military Order No. 1. This language might not allow the D.C. Circuit to decide whether the military commission itself—apart from the standards and procedures that it "use[s]"—is constitutional.

Second, Section 1005(e)(3)(D) may preclude the D.C. Circuit from entertaining petitioner's argument that his trial by a military commission, as opposed to a body constituted and operating in conformity with the Uniform Code of Military Justice, would violate the Geneva Convention. Section 1005(e)(3)(D) appears to allow certain challenges based on the "Constitution and laws of the United States," but fails to mention treaties. By contrast, the preexisting habeas corpus statute makes express reference to treaties: "The writ of habeas corpus shall not extend to prisoners unless . . . [h]e is in custody in violation of the Constitution, or laws, *or treaties* of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). Petitioner should not be forced to abandon his central legal challenges now when there is at least a significant likelihood that he will not be able to make them at a later date.

3. The government will also likely argue that Section 1005(e)(3)(D)'s review procedures do not violate the Suspension Clause because they simply require petitioner to exhaust his military remedies before obtaining judicial review. The rationales underlying the comity-based doctrine of exhaustion as applied to military tribunals are based on (a) the tribunal's ability to resolve claims that would otherwise be considered by the federal court and (b) the tribunal's ability to award the relief that is sought. Those rationales do not apply to the military commission set to try petitioner because that commission is not designed to entertain petitioner's challenge to its validity or authority to try him.

In *Ex parte Royall*, 117 U.S. 241 (1886), this Court held that a state prisoner's pretrial habeas petition should be de-

nied in order to give the state court an opportunity to consider the claims contained in the petition. A central principle underlying this exhaustion requirement is that the state courts are capable of resolving federal challenges to the validity of a prisoner's detention. *See id.* at 252-253. Similarly, in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), this Court applied the exhaustion requirement in the context of a military court's adjudication of a challenge to its jurisdiction. In *Councilman*, a serviceman facing court-martial charges for possession of marijuana sought an injunction from a federal court to enjoin the court-martial proceeding on the ground that the military court lacked jurisdiction to try him for an offense that was not "service connected." *Id.* at 740. The Court held that the serviceman was required to exhaust his military remedies before seeking access to federal court because the expertise of the military court was "singularly relevant" in resolving the serviceman's challenge to the court's jurisdiction. *Id.* at 760; *see also New* v. *Cohen*, 129 F.3d 639, 645 (D.C. Cir. 1997) (requiring exhaustion in case brought by serviceman claiming that he was not subject to court-martial because "[i]f the order resulting in New's court-martial were 'unlawful' . . . that is a matter that can be addressed by the military tribunal)."

Unlike the military courts in *Councilman* and *Cohen*, the military commission set to try petitioner is not competent to consider, or grant him relief on, his constitutional, legal, and treaty-based challenges to the commission's validity and authority. This is not surprising. The commission is not a court of law; its purpose is to determine whether petitioner is guilty of the alleged offenses, not whether the Geneva Convention applies or whether the commission was validly established by the President. Indeed, the military commission procedures, as set forth in Military Commission Order No. 1, assume that the commission has jurisdiction over the detainee, and therefore those procedures do not provide a forum to challenge the commission's jurisdiction. *Cf. Mathews* v. *Diaz*, 426 U.S. 67, 76-77 (1976) (exhaustion is futile when administrative agency has no power to declare governing statute unconstitutional). And because the mili-

tary commission is not competent to rule on the challenge to its jurisdiction, it is also incapable of granting the relief that petitioner seeks. Accordingly, while a comity-based exhaustion requirement does not necessarily violate the Suspension Clause if a court with jurisdiction over the petitioner has competence to entertain his claims and authority to grant relief, that principle has no application to this case.

B. Congress Has Not Invoked Its Suspension Clause Power

The language of the Suspension Clause reflects the Framers' belief that the Great Writ should be readily available and that the power to suspend the writ should be allowed only in the most limited circumstances.[22] Given the profound consequences of suspending habeas corpus, it is not surprising that Congress has exercised its suspension power on only four occasions.[23] Moreover, each time that has Congress has done so, it has expressly stated that it was authorizing suspension of the writ, and each time, the suspension was authorized and effectuated for a limited time, during an actual insurrection or invasion. This consistent historical practice strongly suggests that, absent an unmistakably clear statement by Congress that it intends to disrupt the usual checks and balances found in the Constitution, the Court should not conclude that Congress has acted to suspend the writ of habeas corpus. *See Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Suspension Clause is "a standing admonition to the legislative body of the danger of suspending [habeas corpus], and of the extreme caution they should exercise, before they give the government of the United States such power"); *cf. Webster*

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[22] *See* Francis Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L. J. 605, 608-609 (1970) ("[I]n the Philadelphia Convention and in the struggle for ratification, there was never the slightest objection to according a special preeminence to the Great Writ. Rather, such controversy as there was centered exclusively on whether the writ was always to be available, or whether, in some very restricted circumstances, some possibility of suspension should be admitted.") (footnote omitted).

[23] *See* William F. Duker, *A Constitutional History of Habeas Corpus* 149, 178 n.190 (1980).

v. *Doe*, 486 U.S. 592, 603 (1988) (requiring "heightened showing" of Congress's intent to preclude judicial review of constitutional claims).

(a) During the Civil War, Congress formally authorized the suspension of the writ with the passage of the Habeas Corpus Act, which provided: "That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the *writ of habeas corpus* in any case throughout the United States, or any part thereof."[24] Congress thus made unmistakably clear it was exercising its suspension power, and limited any suspension for the duration of "the present rebellion."

(b) In 1871, faced with widespread armed resistance to Reconstruction, Congress empowered President Grant to suspend habeas corpus when illegal conspiracies, such as the Ku Klux Klan, were acting to overthrow lawfully constituted authorities.[25] The statute expressly stated that Congress was exercising its power to suspend habeas corpus and also limited the suspension to the "continuance" of a "rebellion."[26]

(c) In 1902, during a rebellion against United States authority in the Philippines, Congress expressly authorized the President or the Governor to suspend habeas corpus in the event of, and for the duration of, a "rebellion, insurrec-

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[24] *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (emphasis added); Duker, *supra* n.23, at 168 n.110.

[25] Duker, *supra* n.23, at 178 n.190.

[26] That statute provided: [W]henever in any State, or part of a State the unlawful combinations . . . shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State . . . and the preservation of the public safety shall become in such district impracticable, in every such case such combination shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion . . . it shall be lawful for the President of the United States, when in his judgment the public may require it, to suspend the privileges of the *writ of habeas corpus*." 17 Stat. 14-15.

tion, or invasion."[27] Under this authority, habeas corpus was suspended in two provinces for eight months.[28]

(d) Finally, in December 1941, immediately following the attack on Pearl Harbor, the Governor of Hawaii suspended habeas corpus pursuant to Section 67 of the Hawaiian Organic Act, which authorized the Governor to take this action "in case of rebellion or invasion or imminent danger thereof, when the public safety requires it."[29] The suspension was to remain in effect only "until communication can be had with the President and his decision thereon made known."[30]

In each of these cases, Congress left nothing to implication; it expressly stated that it was authorizing suspension of habeas corpus. Congress thus gave clear indication that it understood the constitutional implications of its actions. In addition, in each case, Congress was reacting to an actual and continuing rebellion, insurrection, or invasion on United States territory and made clear that the suspension could continue only for so long as a threat to duly constituted civil authority on that territory continued. Congress thus appears to have recognized that a valid exercise of its Suspension Clause power requires, at a minimum, (a) an unambiguous statement by Congress that suspension of habeas corpus is authorized, and (b) a temporal limitation of that suspension to the emergency period in which either a "Rebellion" or "Invasion" renders displacement of civil authority necessary.

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[27] Act of July 1, 1902, ch. 1369, 32 Stat. 691. That law provided: "That the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion, insurrection, or invasion, the public safety may require it; in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever, during such period, the necessity for such suspension shall exist."

[28] *See Fisher* v. *Baker*, 203 U.S. 174, 179 (1906).

[29] *See Duncan* v. *Kahanamoku*, 327 U.S. 304, 307-308 (1946).

[30] *Id.*

Section 1005(e)(1) of the Act falls well short of the bar set by Congress' previous exercise of its suspension power. Congress nowhere stated it was exercising its power to suspend habeas corpus in Section 1005. Nor did Congress make any finding that the Nation was currently undergoing a "Rebellion" or "Invasion," or that "the public Safety" was so endangered as to require suspension of the writ. Whether or not the Suspension Clause might have authorized Congress to accomplish such a result had it invoked its powers under that Clause, Congress has not done so. Accordingly, Section 1005(e)(1) cannot be sustained as an exercise of the Suspension Clause power.

C. The Constitutional Prerequisites For Invocation Of The Suspension Power—Invasion Or Rebellion, And Urgent Threat To Public Safety—Are Absent

The Suspension Clause "absolutely prohibits the suspension of the writ, except under extraordinary exigencies." *Yerger*, 75 U.S. (8 Wall.) at 95. Specifically, the "extraordinary exigencies" that would justify the suspension of habeas corpus must include either an "Invasion" or a "Rebellion." *See* U.S. Const. art. I, § 9, cl. 2.

The circumstances surrounding the prior suspensions of the writ, discussed above, reveal that, in each instance, the writ was suspended at a time when the Nation confronted an ongoing rebellion or the immediate aftermath of an invasion, where there was a threat to the operation of duly constituted civil institutions. Presidents Lincoln, Grant, and Theodore Roosevelt each faced internal threats to the Nation's security, and each suspended habeas corpus in response to the immediate danger posed by an ongoing rebellion. The Governor of Hawaii, facing an external threat, suspended the writ the day after the attack on Pearl Harbor. By contrast, Section 1005(e)(1) was not enacted in response to an ongoing rebellion or in the immediate aftermath of an invasion. Indeed, Congress made no finding in the Act that a "Rebellion" or "Invasion" currently exists.

The Suspension Clause also requires that the suspension of habeas corpus be "required by public Safety." U.S. Const. art. I, § 9, cl. 2. The Act seeks to prevent those detained at Guantanamo Bay from seeking habeas relief, but as Justice Kennedy observed last Term, Guantanamo Bay is "far removed from any hostilities." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring). Indeed, Guantanamo Bay is a secure base that was chosen as a military prison precisely because of its distance from a military theater of operations. Therefore, Section 1005(e)(1), which was not enacted in response to an ongoing rebellion or in the immediate aftermath of an invasion and is not required by public safety, is not a valid exercise of Congress's power to suspend habeas corpus.

CONCLUSION

Because the Detainee Treatment Act of 2005 does not divest the Court, or the federal courts generally, of jurisdiction over this case, the Court should proceed to a decision on the merits of this case.

Respectfully submitted.

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